

# DECISION



19958 LUNTER  
THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

FILE: B-202837

DATE: November 4, 1981

MATTER OF: Contract Services, Inc.

## DIGEST:

Based on review of record, GAO concludes that protested solicitation specifications--concerning lease of "multi-passenger" automotive vehicles--were not ambiguous and did provide, contrary to protester's assertions, sufficient detail so that the prospective bidders had a clear and precise understanding of the Government's needs. Moreover, GAO finds that the solicitation's pricing directions were not ambiguous.

Contract Services, Inc. (CSI), has protested certain specifications contained in invitation for bids (IFB) No. N62470-81-B-2103 issued by the Naval Facilities Engineering Command (NAVFAC), Panama Canal Area. The IFB solicited bids for the leasing to the Government of "multi-passenger" automotive vehicles for use in providing school bus transportation services for the Department of Defense Dependents Schools in the Republic of Panama; the actual operation of the vehicles, however, was to be by the Government.

The IFB was issued on March 16, 1981. On April 9, 1981, CSI filed its protest with our Office and requested that NAVFAC be directed to correct alleged specification inadequacies and ambiguities which CSI contended would affect the ability of potential bidders to submit bids on an equal and competitive basis. Despite CSI's request to NAVFAC that bid opening be postponed until our Office determined whether the IFB should be modified or canceled, bids were opened on April 30, 1981. Of the two bids received by NAVFAC, CSI's bid was nearly twice as high as that of the low bidder, Servicios y Alguileres, S.A. (Servicios). An award was made to Servicios on May 15, 1981.

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CSI's protest is based upon the alleged existence of numerous inadequacies and ambiguities in the IFB's specifications. In general, CSI contends that several of the IFB's specifications failed to provide sufficient detail so that the prospective bidders did not have a clear and precise understanding of the Government's needs. Based on our review of the record and our analysis of the alleged ambiguities, as discussed below, we deny the protest.

#### Responsibility for Loss of Vehicle Use

CSI contends that the IFB failed to address the question of continued rental payment by the Government during periods when some or all of the leased buses would be unavailable for use for reasons other than maintenance and repair. CSI cites the following as examples of reasons for loss of vehicle use aside from maintenance and repair: strikes, war, Government failure to provide gasoline, accident, civil disturbance and action taken by the Government of Panama. According to CSI, the IFB required a bidder to make an assumption as to whether the Government must continue to pay the lease charge in these situations. Having to make such an assumption, affects, in CSI's opinion, estimated contract costs.

NAVFAC asserts that paragraph 35 of the IFB's General Provisions leaves no doubt that the contractor will continue to receive lease payments for any vehicle out of service for maintenance and repair provided that the "downtime" is not due to the fault or negligence of the contractor. Specifically, NAVFAC argues that paragraph 35 obliges the Government to make lease payments on the out-of-service vehicle until the vehicle is repaired, replaced or removed from the contract. The cited paragraph provides:

#### "Rental Payments

"\* \* \* Rental charges shall accrue with the commencement of the term of this contract, or from the date that the property is delivered to the Government, whichever is later, and shall continue until the expiration of the term or the termination of this agreement; provided,

that rental shall accrue only for the period that the property is in the possession of the Government. \* \* \* no rent shall accrue with respect to any property during any period when the property is unavailable or unusable as a result of a failure by the Contractor to render services in connection with the operation and maintenance of the property as prescribed by this contract."

### Analysis

In our opinion, the above provision made it clear that rental payments on the vehicles would generally accrue for the period that the vehicles were in the possession of the Government. Nevertheless, the Government made one exception to this general condition by agreeing, in effect, that it would continue to pay rent for vehicles which were in the contractor's possession for maintenance and repair provided this maintenance and repair were not the fault of the contractor. While the examples cited by CSI were not expressly covered by the solicitation, we do not think it was necessary that every eventuality be addressed or that bidders reasonably were required to speculate as to any effect on price. Responsibility for loss of use in the event of the occurrence of any of the examples would, therefore, depend upon the circumstances and applicable law.

### Liabilities in Excess of Insurance

CSI alleges that the minimum liability insurance coverages the IFB required the contractor to provide were low since one accident could involve as many as 60 school children. CSI indicates that because the IFB provided that the Government will operate the vehicles, it was reasonable to expect that the Government had assumed responsibility for all damages arising from operation in excess of the minimum insurance requirements. CSI argues, however, that the IFB was silent on the matter. Thus, CSI contends that a bidder had to make an assumption concerning this loss responsibility when estimated costs were developed for the contract.

### Analysis

We do not agree with CSI that the IFB failed to address the respective liabilities of the Government and the contractor for any injury or damages to third persons and property arising during the course of the performance of the contract. Paragraph 37(b) of the IFB's General Provisions provided that the contractor would be liable and indemnify the Government for all actions or claims for all injury to persons or damages to property resulting from the fault, negligence, wrongful act, or wrongful omission of the contractor, its agents or employees. As to the Government, paragraph 37(b) also provided that the Government would only be responsible for loss or damage to third persons and their property in accordance with the "Federal Tort Claims Act (28 U.S.C. § 2671-2680)."

Although CSI claims that the IFB still did not address the issue of "possible liability by the contractor under Panamanian or United States law for losses caused by the Government for which the Government would have no or only partial liability," CSI has not cited any situation where this result would occur, nor are we aware of any such situation. Therefore, this latter argument is speculative.

### Inability to Begin Scheduled Performance

CSI contends that while the IFB required that contract performance begin on August 17, 1981, performance could have actually begun no earlier than October or November 1981 because of the late issuance of the IFB. CSI alleges that this was because the IFB required that all vehicles used in the performance of the contract be manufactured in the United States with the exception that foreign-manufactured vehicles could be used for a temporary period of time. According to CSI, the delivery of vehicles from the United States required 180-210 days. CSI alleges, further, that no suitable vehicles were available in Panama for temporary use. CSI goes on to contend that the IFB did not address either the possibility that performance could not have begun on August 17, 1981, or the question of the responsibility for failure to perform where acceptable vehicles were not available.

NAVFAC replies that its review of the market conditions in the United States and Panama prior to bid opening revealed that vehicles which either met equipment specifications or could be modified to meet equipment specifications at a minimum expense were available to permit contractors to meet the August 17, 1981, date for beginning performance. NAVFAC also emphasizes that even if there were to have been some slippage in this date, the IFB provided that foreign-manufactured vehicles could have been used temporarily.

### Analysis

CSI has furnished no evidence in support of its above allegations. It is the responsibility of the protester to present evidence sufficient to affirmatively establish its allegations. Robinson Industries, Inc., B-194157, January 8, 1980, 80-1 CPD 20. Speculative allegations on an issue do not meet a protester's burden to affirmatively prove its case. Dynal Associates, Inc., B-197348, July 14, 1980, 80-2 CPD 29. Moreover, NAVFAC controverts the protester's allegations in stating that its review of the market conditions did reveal the availability of an adequate number of vehicles. Where the only evidence on an issue is conflicting statements from the protester and the contracting agency, we have also held that the protester has not met its burden of affirmatively establishing its case. See United Baeton International, B-200721, February 2, 1981, 81-1 CPD 59.

With regard to CSI's contention that the IFB did not address the question of who bore the responsibility for the failure to perform because of the unavailability of acceptable vehicles, we think the IFB made it clear that the contractor had the obligation to begin performance on August 17, 1981. Obviously, then, any failure on the part of the contractor to begin performance on this date would be the contractor's responsibility unless it was otherwise specifically excused under the contract.

### Number of Vehicles Required to be Operational

CSI asserts that while the IFB required the "maximum" amount of equipment be available for operation each day, the quoted term was not defined in the

IFB. Consequently, CSI takes the position that it was uncertain if "maximum" meant the total number of leased vehicles specified by the IFB or if it meant some acceptable lesser number. In CSI's opinion, this uncertainty was critical because a contractor had to know the number of vehicles that must be operational each day in order to have properly estimated maintenance and repair costs, particularly as to whether overtime costs would be incurred for performing routine maintenance.

In addition, CSI argues that there is a closely related issue of whether the IFB effectively precluded the purchase of spare vehicles by stipulating the number of vehicles to be leased; CSI alleges that it is standard industry practice to maintain a fleet of spare vehicles numbering approximately 10 percent of the number of vehicles required to be in service each day. CSI believes that it is questionable whether a contractor could meet the IFB requirements without spare vehicles. Also, CSI asserts the availability of spare vehicles affected maintenance and repair costs because if spare vehicles were available, other vehicles could then be serviced during normal working hours with a minimum of overtime.

#### Analysis

Although the term "maximum amount of equipment" in paragraph 8 of section 0005 of the IFB was not explicitly defined, we think the IFB adequately set forth the obligation of the contractor with respect to the number of buses that had to be operational each day. Paragraph 5.5 of the same section of the IFB provided in pertinent part as follows:

"The maximum acceptable equipment downtime is seven percent of the total demand hours. Demand hours are considered to be eight hours daily in the period 0630 to 1630 hours. Based on a 40 hour administrative work week and eight holidays. Demand hours are rounded out at 2080 hours per year. Downtime percentage is calculated by dividing the total equipment downtime

hours by 2080 times 100. If the downtime of equipment provided under the contract exceeds seven percent, or if the total number of vehicles out of service on any work day exceeds ten percent of the total number of vehicles leased, a corresponding reduction will be made in the compensation paid to the Contractor \* \* \*."

Viewing the foregoing language in the context of the entire IFB, it is our opinion that the IFB provided that the contractor would incur no liability whatever for having less than the total number of leased vehicles operational each day as long as the number of out-of-service vehicles did not fall below the number specified in paragraph 5.5; only after the contractor exceeded the maximum acceptable equipment downtime limitations was there to be any reduction in the rent paid to the contractor. Consequently, it is our view that bidders could have reasonably estimated maintenance and repair costs from a calculation--under paragraph 5.5--of the total number of operating vehicles needed to prevent a reduction in rent for excessive downtime. Further, we see nothing in the IFB which would have prevented a bidder from using spare vehicles as a means of minimizing its maintenance and repair costs as apparently preferred by CSI.

#### Availability of Utilities and Increased Utility Costs

CSI asserts that paragraph 18.6, Public Utilities, of the IFB failed to specify who would bear the cost of any defective performance caused by the Government's reduction of the availability of utilities at Government-provided facilities. CSI also asserts that the paragraph failed to specify who would bear any additional costs incurred in "obtaining and consuming utilities from alternate sources." CSI points out that the paragraph stated that utilities were available at Government facilities but that the Government reserved the right to take action to reduce the availability of utilities.

NAVFAC states that the purpose of expressly reserving the right to reduce available utilities was to warn bidders that past experience in the area

showed that it might be necessary to reduce electricity supplied during periods of brownout or periods of system maintenance and repair. NAVFAC further states that if there were to be reduced availability of utilities, this would result only in the reduced usage of nonessential items such as air-conditioning. NAVFAC emphasizes that any reduced usage would not result in any need to obtain utilities from other sources.

### Analysis

The IFB provides no explanation as to the nature or the amount of any possible utility reduction by the Government. While it may be true that NAVFAC may only intend to reduce usage of nonessential items such as air-conditioning, this intent is not apparent from the IFB. Consequently, a bidder could not determine the exact limitations of a possible reduction by the Government in utilities.

Nevertheless, we think that it is clear from reading paragraph 18.6 that utilities would only be reduced, not eliminated. Also, no change by the Government in the actual locations of available electricity and water was mentioned in the paragraph. In this regard, paragraph 18.6 specified that in order to properly make use of the available utilities, the contractor, at his own expense, had to install and maintain all connections and distribution lines and meters necessary to determine the amount of each utility used. Further, each utility was to be charged to and paid by the contractor. Given this particular method for the provision of utilities, we see no basis to conclude, as urged by CSI, that the contractor might have to obtain "replacement utilities" in the course of performing the contract because of a Government-ordered reduction in the availability of utilities.

As to CSI's argument concerning the alleged failure of the IFB to specify who would bear the costs of defective performance caused by the unavailability of adequate utilities, paragraph 18.6 explicitly stated that electricity and water were available at the site and in turn would be made available to the contractor. We think that this implied that the Government promised to make sufficient utilities available at all times



so that the contractor could properly perform its work. Consequently, it is our opinion that under the terms of paragraph 18.6 of the IFB, the Government obligated itself to provide adequate utilities to the contractor.

#### Imposed Wage Increases

CSI notes that most of the contractor's employees will be Panamanian and that under the terms of the IFB, the contractor must comply with the applicable labor laws of the Republic of Panama. CSI contends, however, that the IFB contained no paragraph specifying who would be responsible for possible cost increases resulting from a change in Panamanian labor laws. CSI therefore contends that when developing contract costs, each contractor had to make assumptions regarding the cost impact of possible changes in Panamanian labor laws.

In response, NAVFAC states that the lack of any provision in the IFB for wage escalation was purposeful and, thus, the successful contractor must bid on the basis that it bears the responsibility for increases in labor costs whether decreed by the Panamanian Government or otherwise.

#### Analysis

The absence of any paragraph in the IFB regarding contract cost increases because of potential wage increases clearly meant that the contractor bore the burden for any escalation in labor costs. Further, we think that CSI is actually objecting to the failure of the IFB to have contained an economic adjustment provision for wages which would have allowed the contractor an equitable adjustment for any increase or decrease in rates of pay for labor during the performance of the contract. In this regard, CSI alleges that any contractor familiar with the business environment of Panama "knows of the volatile labor situation that exists in Panama." However, CSI has offered no evidence to support this allegation. Unsupported allegations do not meet a protester's burden to affirmatively prove its case. Dynal Associates, Inc., supra. Moreover, we are aware of no requirement that mandates the use of an economic

price adjustment clause. See Defense Acquisition Regulation § 3-404.3(a) (1976 ed.), which states that a contract with economic price adjustment may be used under certain conditions.

#### Normal Wear and Tear

CSI states that the phrase "normal wear and tear" was not defined by the IFB. CSI argues that the lack of any definition for this phrase affected estimated contract costs in several ways. First, CSI notes the IFB provided that all vehicles would be returned by the Government at the end of the contract period in the same condition as received less an allowance for "normal wear and tear." In CSI's opinion, the Government's obligations at contract termination remained undefined because of the alleged lack of clarity in the meaning of "normal wear and tear." Second, CSI asserts that since maintenance and repair were the responsibility of the contractor and represented a large portion of the cost to be estimated under the IFB, a lack of clarity in defining normal wear and tear meant that a bidder had to make assumptions regarding the extent of its maintenance and repair responsibility.

CSI further argues that the IFB statement that the leased vehicles would be used to provide schoolbus transportation and "other administrative passenger transport" or "other administrative bus services" affected what was to be considered normal wear and tear. According to CSI, it was not known whether the terms "other administrative passenger transport" or "other administrative bus services" included transporting troops or transporting personnel into areas of civil disturbance. CSI asserts that troops would cause more wear and tear than civilian personnel and that significant vehicle damage could occur in areas of civil disturbance.

NAVFAC declares that "normal wear and tear" is a standard phrase that is applied to a passenger vehicle being operated for a stated number of miles. NAVFAC further emphasizes that the IFB was for buses to transport passengers. NAVFAC argues that the phrases "other administrative passenger transport" and "other administrative bus services" cannot be

strained to mean that the leased vehicles would be operated to provide tactical requirements such as transporting troops in full combat uniform.

### Analysis

We do not think that it was necessary for the IFB to have defined the term "normal wear and tear." This term is commonly used to describe the depreciation in value of property through ordinary and reasonable use. See Black's Law Dictionary, 1764 (4th ed. 1951); Webster's New Collegiate Dictionary, 1326 (1975). In view of this commonly understood meaning, we fail to see the need for any explicit IFB definition of the term.

While it is not clear what the "other administrative passenger transportation" services were, we do not think that such IFB-required services included the transportation of troops into areas of civil disturbance. The key factor, in our opinion, was that the IFB specified that the other bus services were to be "administrative" in nature; this term, in our view, implies passenger use reasonably compatible with the transportation of students. Consequently, we find no basis to conclude that the IFB suggests that the leased buses will be subject to any abnormal amount of wear and tear because of the transportation of troops.

### Option to Purchase

CSI contends that while the IFB gave the Government the right to negotiate at the end of the contract period or at the end of any year in the contract period the purchase of the leased vehicles, the IFB did not specify whether the Government's right was one of first refusal should the contractor decide to sell or whether a unilateral decision by the Government to purchase was binding upon the contractor. If the option right was meant to be unilateral and binding, CSI argues that the IFB also left unclear what responsibility the contractor has to replace vehicles sold to the Government prior to contract completion. If replacement vehicles were not required, CSI further believes that the IFB failed to address what effect a reduction in the

required number of vehicles would have upon certain cost recovery adjustments given to the contractor under the IFB.

NAVFAC states that the purpose of reserving the right to negotiate the purchase of the vehicles was to provide the Government with the ability to continue the passenger transportation services should the contractor be financially unwilling or unable to perform. NAVFAC also states that if the Government were to negotiate the purchase of the vehicles, replacement vehicles from the contractor would not be required. As to the contractor's related costs and expenses, NAVFAC indicates that such costs would be a legitimate item in the purchase negotiations.

#### Analysis

Paragraph 5.1 of section 00001 of the IFB provided as follows:

"The Government reserves the right to negotiate the purchase of any or all of the vehicles leased at the end of any year in the contract period or at the completion of the contract."

From the foregoing language, we think it is apparent that the Government was reserving the bare right to enter into negotiations to purchase any or all of the leased vehicles if it desired to do so. Consequently--and not improperly, in our view--this paragraph did not define the terms of the purchase--including price--because such terms were to be "negotiated" by the Government and the contractor; obviously, if the contractor and the Government did not agree on all terms, there would be no option to be exercised. In any event, since any purchase option pricing that might be agreed to during the contract would not be the result of a competitive procurement, the acceptability of the option is to be competitively tested before the option's exercise. See KET, Inc., 58 Comp. Gen. 38 (1978), 78-2 CPD 305.

### Facilities for Operations and Storage

CSI asserts that the IFB failed to specify who was "responsible for placing [storage] facilities in usable condition." CSI also asserts that no opportunity for inspection of the Government-provided facilities was provided for in the IFB. According to CSI, a contractor in developing estimated contract costs must make assumptions regarding its responsibilities in the area and regarding the condition of the Government facilities.

NAVFAC states that the contractor was required to accept the Government-provided facilities in their present condition "which is such as to permit anticipated operations with no further improvement required." NAVFAC also states that contrary to CSI's contention, paragraph 12 of the IFB's instructions to bidders encouraged bidders to visit the facility sites and satisfy themselves as to conditions which could affect performance.

### Analysis

We agree with NAVFAC that the IFB, as set forth in paragraph 12 of the Instructions to Bidders, encouraged bidders to inspect the facilities that would be furnished by the Government. Moreover, CSI does not contest NAVFAC's assessment of the current physical condition of the facilities in question. Consequently, had CSI visited the facilities as it was encouraged to do, it would have seen that the facilities did not need restorative work. Therefore, this objection lacks merit.

### Bid Pricing Instructions

CSI asserts that, in addition to the ambiguities it found in the IFB prior to bid opening, "an ambiguity in the bid pricing instructions was discovered during discussions with the Navy after bid opening." CSI alleges that in preparing its bid it included vehicle lease costs in Bid Item 1.a. and vehicle lease costs plus maintenance costs in Bid Item 2.a. These items were set forth in the IFB as follows:

"[1.]a. Unit price per vehicle per year including the indicated miles per vehicle. This item does not include any maintenance or repair \* \* \*. [There followed three blanks for prices at various annual mileage levels.]

"b. Rate per vehicle mile for [excess] mileage \* \* \*.

"[2.]a. Unit price per vehicle per year for full maintenance and repair services \* \* \* including the average miles per vehicle per year stated in Bid Item 1.a.

"b. Rate per vehicle mile for [excess] mileage \* \* \*.

"Total 1.a. and 2.a. \_\_\_\_\_"

CSI asserts that it prepared its bid in this manner because it interpreted Bid Item 2.a. as asking that lease costs be also combined with maintenance costs in pricing under this item.

CSI alleges that after bid opening the Navy informed it that Bid Item 1.a. should have included only vehicle lease costs and Bid Item 2.a. only maintenance costs. CSI alleges that as a result of the mistake made in bidding under Bid Item 2.a., its bid was overstated by \$370,548 and that its "correct" bid is \$632,342.75, or still more than \$150,000 higher than the price of the awarded contract. And CSI argues that its "correct" bid was 36 percent below the Government estimate. Coupled with the fact that Servicios' bid of \$457,315.30 was 44 percent below the Government estimate, CSI concludes that the bidding makes clear that "each bidder was forced to make certain and varying assumptions when preparing its bid" in response to the allegedly ambiguous and defective specifications in the IFB.

Given the above bidding structure of the IFB, NAVFAC contends that CSI's interpretation of the language of Bid Item 2.a. would require the conclusion that the Government would be awarding a contract

which would be composed of lease costs in Bid Item 1.a. and lease and maintenance costs in Bid Item 2.a. In NAVFAC's opinion, such an interpretation is unreasonable because it would mean that the Government was inviting a bidder to double the vehicle lease costs.

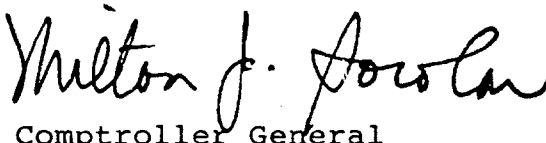
### Analysis

We fail to understand how CSI could have interpreted Bid Item 2.a. as asking that lease cost be combined with maintenance costs. The IFB explicitly stated that "bids [were to] be submitted on a total lump sum price" resulting from the addition of Bid Item No. 1 and Bid Item No. 2. Under Bid Item No. 1, bidders were cautioned that this item did not include any maintenance or repair of the vehicle other than that covered by the original equipment warranty. Under Bid Item No. 2, bidders were told to provide a unit price per vehicle for full maintenance and repair services. The phrase "including the average miles per vehicle per year stated in Bid Item 1.a." referred only to the miles it was anticipated that the vehicles would be driven each year. Thus, this phrase meant only that the bidders were to bid maintenance costs based on the mileage levels for the vehicles set forth in Bid Item 1.a. Consequently, we reject CSI's allegation that the item pricing directions were ambiguous.

Concerning CSI's allegation that it made a mistake in interpreting the pricing directions, it is sufficient to note that CSI admits its bid is not low even as "corrected." Moreover, given our above conclusion, which denies CSI's other grounds of protest, we reject CSI's argument that the difference in the bids received here is attributable to the alleged ambiguities in the IFB.

### Conclusion

CSI's protest is denied.

*for*   
Comptroller General  
of the United States